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IN THE

Supreme Court of the United States

October Term, 1944.

No. 462.

J. F. FITZGERALD CONSTRUCTION COMPANY,

Petitioner,

vs.

CHRIS PEDERSEN, Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,

Respondent.

Brief on Behalf of Respondent, Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself and all Employees of the Defendant Similarly Situated.

WILLIAM E. J. CONNOR,
Counsel for Respondent.

Dated: January 22, 1945.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

J. F. FITZGERALD CONSTRUCTION COMPANY,

Petitioner,

vs.

CHRIS PEDERSEN, Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,

Respondent.

Brief on Behalf of Respondent, Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself and All Employees of the Defendant Similarly Situated.

Prior Opinions.

The opinion of the Court of Appeals of the State of New York of June 14, 1944 (R. 63-65) is reported in 293 N. Y. 126. The decision of the Appellate Division, Third Department, of the Supreme Court of the State of New York, of November 18, 1943 (R. 51-58) is reported in 266 App. Div. 1032. The opinion of the Supreme Court of the State of New York of May 21, 1943 (R. 42-47) is unreported. The *per curiam* opinions of this Court, of February 8, 1943, and March 8, 1943, respectively, are reported in 318 U. S. 740 and 318 U. S. 742, respectively.

The prior decision (without opinion) of said Court of Appeals (R. 27) is reported at 288 N. Y. 687; the prior

opinion of said Appellate Division (R. 20-22) is reported at 262 App. Div. 665; and the prior opinion of said Supreme Court (R. 12-15) is reported at 173 N. Y. Misc. 188.

Jurisdiction.

The statute involved is the Fair Labor Standards Act of 1938 (29 U. S. Code Sec. 201, *et seq.*), the pertinent provisions of which are set forth in an appendix hereto.

Rule 113 of the Rules of Civil Practice of the State of New York is printed in full in the appendix hereto. Since the very facts upon which this appeal is based was heretofore decided by this Court in this same entitled case at 318 U. S. 740, and since the entry of the judgment was pursuant to Rule 113 of the Rules of Civil Practice of the State of New York, a rule of civil procedure in the State Court, the plaintiffs do not concede the jurisdiction of this Court.

Statement of Facts.

This action was begun in June, 1939, by the service of a verified summons and complaint. In this complaint (R. 4 and 5) the plaintiffs repeatedly alleged that the work they performed was in interstate commerce (see paragraphs of complaint 2, 3, 4, 5 and 7). The action was tried pursuant to an agreed stipulation of facts (R. 9). The pertinent facts are:

In September, 1938, abutments supporting two interstate railroad bridges were washed out and the substructures of two other interstate bridges were damaged by flood. Thereafter the railroad company entered into a contract with the defendant * * * for the construction of entirely new abutments under the two bridges

where the abutments had been washed out and for repairing the substructures of the other two bridges which had been damaged. The defendant* employed the plaintiffs * * * as its employees in doing work under a contract. The contract, the work of which the plaintiffs* performed, was two-thirds the construction of new abutments and the remainder the repair of the substructures of the other two bridges.

The Trial Justices dismissed the complaint (R. 18). The dismissal of the complaint was by a divided vote upheld by the Appellate Division of the Supreme Court of the State of New York, three judges voting to affirm and two judges voting to reverse. Upon appeal to the Court of Appeals of the State of New York the dismissal of the complaint was unanimously affirmed without opinion. Thereafter this Court granted a writ of certiorari, reversed the decisions of the State Court with costs and remanded the case to the Supreme Court of the State of New York for further proceedings not inconsistent with the opinion of this Court (R. 29-31).

The defendant, feeling aggrieved by the decision of this Court, again applied to this Court for a rehearing or re-argument and this application was denied (R. 32-34). The Court, however, modified its original decision as follows: "and without prejudice to a determination of the nature of the employment of any of the members of the class on whose behalf this suit has been brought."

On May 3rd, 1943, the defendant again moved in the Supreme Court of the State of New York for a dismissal of the complaint on no papers whatsoever except those found at R. 34 which is merely a motion to dismiss the

*Because of the many appeals in this case and the fact that the plaintiffs and defendant have interchangeably been respondent and appellant, for the purpose of this brief, the J. F. Fitzgerald Construction Company will always be referred to as the defendant; and Chris Pedersen, et al., will always be referred to as plaintiffs.

complaint. No proceedings whatsoever of any kind intervened between the decision of this Court and the defendant's motion to dismiss the complaint except the entry of the bill of costs of the plaintiffs (R. 32-34, inc.).

After defendant's motion to dismiss the complaint was served, the plaintiff moved before the same Court returnable the same day, for a motion for summary judgment pursuant to the provisions of Rule 113 of the Rules of Civil Practice of the State of New York. *The defendant did not in any way resist this motion by interposing any answering affidavits of any kind showing to the Court that there was any issue of any kind to be tried.*

The Supreme Court of the State of New York denied defendant's motion to dismiss the complaint (R. 34) and granted the motion for summary judgment (R. 41).

From these decisions the defendant appealed to the Appellate Division of the State of New York which in all respects sustained the lower Court. From the decision of the Appellate Division the defendant appealed to the Court of Appeals of the State of New York, which in all respects sustained the Appellate Division.

The defendant then applied to this Court for a writ of certiorari upon two grounds: (1) whether the entry of judgment for the plaintiffs by the Supreme Court of New York is in conflict with the decision of this Court and constitutes a violation of the prior mandate of this Court; and (2) whether interest may be added to the damages.

This Court granted the writ of certiorari limited to the second point.

The defendants then applied to the Court of Appeals of the State of New York in an application to modify the provisions of the remittitur of the Court of Appeals asking that the remittitur be modified as follows:

> "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a *prima facie* case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."

The Court modified the order of remittitur exactly as requested by the defendant. The defendant then filed a petition for rehearing to remove the limitations imposed by the order of November 6, 1944, and this Court *ex parte* lifted those limitations and granted the writ of certiorari which is now before the Court.

ARGUMENT.

POINT I.

The only federal question before this Court having heretofore been decided by this Court, and the plaintiff having established a *prima facie* case and the defendant having failed to avail itself of the modification of the decision of this Court, the judgment appealed from should be sustained.

This appeal involves the same judicial determination as that which was heretofore before this Court (*Pedersen v. Fitzgerald Construction Co.*, 318 U. S. 740 and 318 U. S. 742). That certiorari was from the Supreme Court of the State of New York which dismissed the com-

plaint. This Court reversed and remanded the case to the State Court for further proceedings in conformity with the judgment and decree of this Court. This appeal is also from an order of the same State Court denying a motion to dismiss the complaint. It would, therefore, seem obvious that so far as this appeal is from the denial of the motion to dismiss the complaint, the doctrine of *res judicata* must apply.

But this appeal is also from an order granting a motion for summary judgment. When it became obvious that the defendant did not intend or was unable to avail itself of the modification of the reversal by this Court which provided that the reversal was "without prejudice to a determination of the nature of the employment of any of the members of the class on whose behalf this suit has been brought," the plaintiffs moved before the same Court and at the same time as the motion to dismiss the complaint was returnable, for summary judgment pursuant to Rule 113 of the Rules of Civil Practice of the State of New York. This motion was made upon the affidavit of William E. J. Connor, the record on appeal, the decision of this Court, and upon all other papers and proceedings heretofore had.

Rule 113 of the Rules of Civil Practice, which is printed in full in the appendix, provides in short that either party to an action may move for judgment before trial, and that judgment must be granted "unless the other party by *affidavit* or other proof shall show such facts as may be deemed by the Judge hearing the motion sufficient to entitle him to a trial of the issues." This section has repeatedly been held to be constitutional. *Stewart v. Ahrens* (273 N. Y. 591); *Hanna v. Mitchell* (202 App. Div. N. Y. 504; affd. 235 N. Y. 534); *Dwan v. Massarene* (199 App. Div. N. Y. 872); *General Investment Co. v. Interborough R. T. Co.* (235 N. Y. 133).

Notwithstanding anything contained in opponent's brief, it is the well established law of the State of New York that in order to defeat a motion for summary judgment under Rule 113 the opposing party *must* submit proof by affidavit or otherwise that there is an issue to be tried. In fact the language of Rule 113 itself so provides as will be noted from the quoted portion, *supra*. Professor Carmody in his treatise on the New York Civil Practice says at page 2361, section 1074, volume 3, Carmody's New York Practice:

> "* * * and the defendant *must* substantiate the ultimate facts stated in his answer by affidavit." (Italics ours.)

Wait's New York Practice Simplified, Fourth Edition, Volume 3, at page 612 states:

> "This does not mean, however, that the application will be denied because the pleadings themselves raise an issue. It is obvious under the rule that facts *must be presented by affidavits showing that there is an issue.*" (Italics ours.)

And the following cases have held that the answer itself is not an affidavit within the meaning of the rule: *Hoof v. John Hunter Corp.*, 193 N. Y. S. 91; *Nathan H. Gordon Corp. v. Cosman*, 232 App. Div. N. Y. 280.

We quote again from Wait's New York Practice, page 618:

> "Where the moving papers are *prima facie* sufficient, however, the defendant must meet them by affidavits setting forth such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff.
>
> "These affidavits *must* indicate that there is a *bona fide* issue and not merely that the defendant is taking advantage of some technicality of plead-

> ing. *Wrobel v. Call*, 142 Misc. N. Y. 610; 255 Supp. 258. There *must* be real and substantial facts shown *in the affidavit* sufficient to entitle the defendant to defend. *Strasburger v. Rosenheim*, 234 App. Div. N. Y. 544." (Italics ours.)

And again at page 619 of Wait's New York Practice, we quote:

> "In short, the motion is not based upon the pleadings as such, but rather upon the evidentiary facts *contained in the affidavits.*"

And at page 620 of Wait's New York Practice, we quote:

> "The truth or falsity of the allegations in the affidavits cannot, of course, be determined on a motion under Rule 113. The sole question presented is whether the affidavits raise an issue of fact sufficient to entitle the defendant to a trial of the issues. *Adler v. Wiener*, 197 N. Y. S. 599."

In determining procedure in law actions the construction of state laws by the State Courts is binding on the Federal Courts. *Cherry v. Howell* (40 F. Supp. 597).

Rule 113 of the Rules of Civil Practice has been used repeatedly in proceedings in the Federal Courts, and the Federal Courts have always given it the same judicial interpretation as that given to it by the State Courts as shown above. *Maslin v. Columbian National Life Insurance Co.* (3 F. Supp. 368); *Hess & Bro. v. Small* (288 F. 95); *Massee & Felton Lumber Co. v. Benenson* (23 F. [2d] 107).

In the case of *United States v. Fiedler*, 37 Fed. (2d) 578, the Court said:

> "The defendants filed no affidavit in support of, or in amplification of their answer. In the circumstances, is the answer sufficient? * * * No such allegation is made, and the absence of a support-

ing affidavit raises the presumption that the defense is not offered in good faith, and that it could not be sustained. *S. M. Hess & Bro. v. Small* (D. C.), 288 F. 995; *Maltz v. Daly*, 120 Misc. Rep. 466, 198 N. Y. S. 690."

Again in the case of *Maryland Casualty Co. v. Sparks*, 76 F. (2d) 929, the Court said:

> "We come then to the attack upon the summary judgments as such. A speedy method of obtaining judgment upon contracts or judgments where no valid defense is interposed has been employed in Michigan for almost 100 years. If there are issues of fact the motion for summary judgment is denied, and the issues are left for a jury to determine. If there are no questions of fact the judge applies the law in accordance with the admitted facts as disclosed by the affidavits. *Peoples Wayne County Bank v. Wolverine Box Co.*, 250 Mich. 273, 276, 277, 230 N. W. 170, 69 A. L. R. 1024. It has never been doubted that local statutes and rules for the granting of summary judgments are binding upon the federal courts by virtue of the Conformity Act (28 U. S. C. A., Sec. 724). *Massee & Felton Lumber Co. v. Benenson*, 23 F. (2d) 107 (D. C. N. Y.); *United States v. Fiedler*, 37 F. (2d) 578 (D. C. N. Y.); *Maslin v. Columbian National Life Ins. Co.*, 3 F. Supp. 368 (D. C. N. Y.); *Elting, Collector, v. North German Lloyd*, 287 U. S. 324, 53 S. Ct. 164, 77 L. Ed. 337; *Hoff v. St. Paul-Mercury Indemnity Co.*, 74 F. (2d) 689 (C. C. A. 2). Summary judgment statutes do not deprive defendants of the right to trial by jury if the affidavits present no question of fact. *Ex Parte Peterson, Receiver*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919."

In *Less v. Grauhard*, 205 App. Div. N. Y. 344, at page 346, the Court said:

> "Moreover, we are of the opinion that the denials contained in the defendant's answer were insufficient to raise issues or to defeat the plaintiff's motion. The futility of such denials in opposition

to a motion to strike out an answer under rule 113 was considered in *Dwan v. Massarene* (199 App. Div. 872), and this Court there said that: 'The defendant must show that he has a *bona fide* defense to the action, one which he may be able to establish. It must be a plausible ground of defense, something fairly arguable and of a substantial character. *This he must show by affidavits or other proof.* He cannot shelter himself behind general or specific denials, or denials of knowledge or information sufficient to form a belief. *He must show* that his denial or his defense is not false and sham, but interposed in good faith and not for delay. If he shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend, this court will not review the order, as we consider that no substantial right of the plaintiff has been violated.'

"The answer in the present case contains nothing but specific denials. *No affidavit* is filed by the defendant in opposition to plaintiff's motion, the defendant relying upon the pleadings. Defendant's answer was insufficient to show that he has a *bona fide* defense to the present action. As was said in *Dwan v. Massarene* (*supra*): 'He cannot shelter himself behind general or specific denials.'

"In *General Investment Co. v. Interborough R. T. Co.* (225 N. Y. 133) the constitutionality of rule 113 was passed upon and sustained by the Court of Appeals." (Italics ours.)

In fact this was particularly pointed out by the Court of Appeals in the case at bar by Judge Loughran in the opinion wherein it was stated:

> "On the record as it stood, summary judgment for the plaintiffs was inevitable" (R. 64).

The record on appeal completely established a *prima facie* case under the Fair Labor Standards Act of 1938 (29 U. S. Code, Sec. 201, *et seq.*). The complaint alleges that the plaintiffs were engaged in interstate work for the defendant, that they worked in excess of the number

of hours permitted by the statute and were not paid the amounts required by the statute. The agreed statement of facts conclusively shows that the plaintiffs were engaged in interstate commerce, worked in excess of the number of hours permitted, without being paid the amounts required by the statute. A comprehensive reading of the agreed statement of facts will disclose that the intention of the parties was to agree upon the following facts:

1. The Boston & Albany Railroad is an interstate railroad.

2. Four bridges on this railroad were damaged by flood.

3. The bridges carried the tracks of this interstate railroad.

4. The defendant made a contract to repair these four bridges.

5. This contract provided for nothing whatsoever except the repair of these four interstate railroad bridges.

6. The work provided in this contract was as follows: Two-thirds of the total work performed was the construction of new abutments and the remainder the repairs to the substructures of the other two bridges.

7. The plaintiffs performed this work under this contract.

It was, therefore, agreed by the parties that the specific work of these plaintiffs was the rebuilding of abutments under two bridges of an interstate railroad and repairing the substructures of two other bridges of the same interstate railroad.

According to the decision of this Court in *Overstreet vs. North Shore Corporation* (318 U. S. 125, 127), the complaint alleged that "Brazle was engaged in mainte-

nance and repair work on the road and bridge." This Court held that such description of the nature of Brazle's duties sufficiently stated a cause of action and that the complaint should not be dismissed. If an allegation of this nature is sufficient to sustain a complaint, the uncontradicted proof should be sufficient to support a judgment.

Mr. Justice Foster of the Supreme Court analyzed this agreed statement of facts as follows:

> "The fair import of these conceded facts is that the defendant was engaged in certain work and the plaintiff and his associates were its employees, not generally, but in doing *this particular work* * * * but in any event the conceded facts, in my judgment, embrace no activities not essential to the main work of repair (*Pedersen vs. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made."

If any of these plaintiffs was engaged in work not a part of interstate commerce, it must of necessity have been work other than that of repair of substructures or the rebuilding of abutments of interstate railroad bridges. And under such circumstances the defendant should have excluded these plaintiffs from its stipulation.

When this agreed statement of facts was drawn it must be remembered that the stipulation applied to the work of forty plaintiffs. It is obvious that in the repair of a bridge where a portion of the work was the construction of new abutments and the other portion was the repair of substructures, that there are many different types of work to be done, even though all of them are repair work. It, therefore, became necessary in describing the nature of the work performed by these forty

plaintiffs, to make a broad stipulation of the nature of their duties and still have that stipulation show that their work was in connection with the repair of the substructures and the construction of abutments on interstate railroad bridges. We believe that a comprehensive reading of the agreed statement of facts will show that this is exactly what was agreed. Moreover, since the contract between the Fitzgerald Construction Company and the Boston & Albany Railroad Company was a contract for the repair of an instrumentality of commerce, and since nothing whatsoever was in this contract except this particular work, it necessarily follows that everyone engaged in the performance of that contract was engaged in interstate commerce.

It may well be that the Fitzgerald Construction Company had employees who were at work in other places, on other jobs and on matters not connected with *this contract,* but all who were engaged in the performance of *this contract* in any capacity were engaged in interstate commerce or in work so closely connected with interstate commerce as to be, in legal contemplation, a part of it. The defendant was at liberty at any time before entering into the stipulation to have excepted from the stipulation any or all of the plaintiffs, but it elected to include all plaintiffs. By so doing it stipulated that all plaintiffs were engaged in commerce according to the decision of this Court in the case at bar (*Pedersen v. Fitzgerald Construction Co.,* 318 U. S. 742). Our contention that all men engaged in the performance of this contract were engaged in commerce is supported by the decision of this Court in *Pedersen v. Delaware, Lackawanna & Western Railroad* (229 U. S. 146). In the *Pedersen v. Delaware, Lackawanna & Western Railroad* case it was contended that at the time of his injuries Pedersen was not engaged in removing the old girder and inserting a new one, but was "merely carrying to the

place where the work was to be done some of the material to be used." The Court said:

> "We think there is no merit in this. It was necessary to the repair of the bridge that the material be at hand and the act of taking them there was a part of that work. In other words it was a minor task which was essentially a part of the larger one as is the case where the engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

In other words the Court pointed out that every task regardless of how minor it may be, if it be a part of the repair of an interstate railroad bridge, is a part of commerce. It is difficult to assume any detail more minor in the repair of a bridge than the work which Pedersen was performing in the *Pedersen v. Delaware, Lackawanna & Western Railroad* case.

The modification of this Court's decision which was obtained entirely *ex parte,* has always been considered by the plaintiffs as merely a concession to the defendant wherein it was granted an opportunity (notwithstanding its defeat in this court) to submit proof, if the same were available to them, that some of the members of the class on whose behalf this action had been brought, were not actually engaged in repair work, but were in fact engaged in duties not connected with interstate commerce.

Mr. Justice Foster interpreted the modification thus:

> "Nor do I regard the modification by the Supreme Court of its original mandate as of vital significance insofar as the foregoing conclusions are concerned. Such modification was granted after a petition by the defendant for a rehearing. It was no more a direction to the plaintiff than it was permission to the defendant to re-open the matter, if either so desired, and could so do under

> our practice, for the purpose of getting further proof as to the precise activities of plaintiff and his associates. A new trial was not directed, and in no sense do I regard the modification as a finding that the agreed facts were insufficient upon which to base a judgment."

To establish its contention the defendant herein has submitted to this Court a number of cases, most of them railroad cases which have held at one time or another, that men employed upon a railroad which is both interstate and intrastate railroad, are at times engaged in intrastate work, and have sought to apply those cases to the case at bar. The cases submitted, as will hereinafter be shown, are not controlling. The fallacy of its argument is obvious. It is apparent that upon a railroad doing both interstate and intrastate work that at times men are employed upon instrumentalities which are not at the times instrumentalities of commerce. Defendant therefore in the preparation of its brief has analyzed a great number of cases, and whenever it has found a case of a man using a hammer, wheeling a wheelbarrow, mixing gravel, or doing any of the hundreds of different types of manual labor, and the Court has held that he was not engaged in commerce, it has then cited this case as an authority for the case at bar. The fact is that in each case cited the specific work being performed was being done by a workman at a time when he was working upon an instrumentality either never a part of commerce or one that has been withdrawn from commerce.

We call the Court's specific attention to the fact that in all cases submitted by the defendant in its brief before this Court, the defendant has failed to submit one single case of a workman engaged in any capacity whatsoever upon a railroad bridge. The plaintiff will now endeavor to demonstrate to the Court that the cases sub-

mitted by the defendant before this Court are neither pertinent nor controlling.

In the case of *Shanks v. Delaware, Lackawanna & Western Railroad Co.* (239 U. S. 556), the Court pointed to the distinction itself by stating at page 560:

> "Shanks was not employed in interstate transportation or in repairing or keeping in usable condition a roadbed, *bridge*, engine, or car or other instrument then in use in such transportation." (Italics ours.)

In the case of *Chicago & Northwestern Railroad Co. v. Bolle* (284 U. S. 74), this Court again pointed to the distinction when it said, at page 77:

> "But his employment at the time of the injury was confined to firing the stationary or locomotive engine for the sole purpose of producing steam. The character of the work which he did at other times becomes immaterial."

In the case of *Chicago & Eastern Ill. Railroad Co. v. Ind. Comm.* (284 U. S. 296), the Court held that persons engaged in furnishing sand or water to locomotives where there is *no proof* as to whether the locomotives are to be used in either interstate or intrastate commerce have not established the burden of showing they were engaged in interstate commerce. This case is in no way pertinent, for it is the contention of the plaintiffs that if the plaintiffs were delivering sand or water for the repair of an interstate railroad bridge used in interstate commerce, that they would be engaged in interstate commerce, and the *Chicago & Eastern Ill. Railroad Co. v. Ind. Comm.* case does not hold otherwise. The reason for the decision of this Court in the *Chicago & Eastern Ill. Railroad Co.* case was obviously because there was a failure of proof that the sand and water was to be used upon an instrumentality of commerce.

In the case of *New York, New Haven and Hartford Railroad Co. v. Bezue* (284 U. S. 415) the particular services performed by Bezue was the repair of a locomotive which had been withdrawn from transportation so that the instrumentality itself was not in interstate commerce.

The case of *McLeod v. Threkeld* (319 U. S. 491) was the case of an independent contractor operating a restaurant and furnishing food to employees of a railroad, the employees paying for the food themselves, and this Court again pointed to the distinction by referring to the very case at bar in the following language:

> "So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads (*Pedersen v. J. F. Fitzgerald Construction Co.*, 318 U. S. 740)."

POINT II.

It was proper to add interest to the award.

The liability for liquidated damages under the Federal Fair Labor Standards Act is contractual in character (*Overnight Motor Co. v. Missell*, 316 N. Y. 572, 583; *Northwestern Yeast Co. v. Broutin*, 133 F. 2d 628; see, too, *Cox v. Lykes Brothers*, 237 N. Y. 376; *Wright v. State of New York*, 223 N. Y. 44; *Calvin v. Huntley*, 178 Mass. 29).

Section 480 of the Civil Practice Act reads as follows:

> "* * * In every action now pending or hereafter brought wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether thereto-

fore liquidated or unliquidated, and shall be added to and be a part of the total sum awarded."

"This section is a mandatory direction to the court to include in every verdict on a contract action the interest thereon, whether the demand was liquidated or unliquidated." *McLaughlin v. Brinkerhoff* (222 App. Div. N. Y. 458).

In actions for breach of contract the interest runs from the date of the breach (*Greater New York v. Philadelphia and Reading*, 252 App. Div. N. Y. 883).

While in other cases it is held that interest should be computed from the date of the commencement of the action (*Morgan Lake Co. v. New York, N. H. & H. R. R. Co.*, 262 N. Y. 234).

See also *Sweeney v. City of New York* (173 N. Y. 414), wherein the Court reviews the question of adding interest to the amount of judgment on a date from which the interest should run. The Court said, quoting from Judge Earl in *White v. Miller* (78 N. Y. 393):

"Where an account for services, or for goods sold and delivered, which has become due and is payable in money, although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running; and that, if not demanded before, the commencement of suit is a sufficient demand to set the interest running from that date."

In the case at bar the amount the plaintiffs had due them was known, ascertainable, agreed and stipulated upon between the parties to be a certain amount of money at the date the action was commenced. They are, therefore, entitled to interest under the same for howsoever long the defendant is in default in making payment.

In *Quinn v. Sigretto* (229 App. Div. N. Y. 727) the Court held that the plaintiff was entitled under this section

to have interest added to the verdict and included in the judgment even though not demanded in the complaint or proved on the trial.

In *Freedman v. Hart & E. Co.* (162 Misc. N. Y. 487) the Court held that the date of institution of action is the fairest point to start the running of interest.

Even before the enactment of Section 480 of the Civil Practice Act of the State of New York, the question of whether or not a judgment carried with it interest was determined by whether or not at the time the action was commenced the defendant knew or was able to ascertain the exact amount of money owed the plaintiff. In the present case the amount due to the plaintiff was known and ascertainable at the time that the summons and complaint were served. In fact, in the agreed stipulation of facts the amount of money due each plaintiff was agreed upon by the parties and fixed at a definite sum down to the last penny. That amount of money was due each of the plaintiffs in 1939 and it has been due to the delay of the defendant that the same has not been paid.

The Courts have repeatedly held that the additional equal amount of damages that the defendant who fails to pay his workers under the Fair Labor Standards Act is required to pay, is not a penalty, but is in the form of liquidated damages, and is additional compensation to the employees for the illegal deprivation of such compensation, and is due them immediately upon the violation of the statute. See *Maddox v. Jones* (42 F. Supp. 35), *La Guardian v. Austin-Bliss General Tire Co.* (41 F. Supp. 678), *Hargrave v. Mid-Continent Petroleum Corporation* (36 F. Supp. 233), *Robertson v. Argus Hosiery Mills* (32 F. Supp. 19).

Since the amounts due these men are in the form of liquidated damages, the amounts of which are easily ascer-

tainable, and since it was due at the time of the commencement of the action, there can be no doubt that interest thereon should be paid to them, just as interest was paid to the employees in a similar case under the same statute in *Sneider v. Sports Vogue* (35 N. Y. S. 2nd 341).

Chief Justice Hughes of the United States Supreme Court, speaking on the subject of interest in the case of *Funkhouser v. J. B. Preston Co.* (290 U. S. 167), said:

> "The statutory allowance is for the purpose of securing a more adequate compensation by adding an amount commonly viewed as a reasonable measure of the loss sustained through delay in payment. It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated claims has been in evolution (*Faber v. New York*, 222 N. Y. 255), and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality."

In another part of the same decision Justice Hughes said:

> "Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty, as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computa-

tions alone or by computation in connection with established market values or other generally recognized standards."

"A debtor has no substantial right to avoid the payment of interest in full." *Preston Co. v. Funkhouser* (261 N. Y. 140.)

The fact that this action was brought under a federal statute in no way changes the circumstances. In *Schumacker v. Leterman, et al.* (14 Fed. Supp. 1015) it is clearly pointed out that in the Federal Courts the question of whether or not interest is added to the judgment depends upon the law of the state in which the District Court is located. In that case the Court stated:

"Interest runs on judgments of the district court where by law of the state where such court is held interest runs on judgments of the state courts. Revised Statutes, Section 966 (28 U. S. C. A., Sec. 811). Since the New York Law is that judgments carry interest (Civil Practice Act, Section 481), this judgment should carry interest."

In *Klausner v. Queens Fur Dressing Co., Inc.* (130 Misc. N. Y. 579), the Court said:

"The rule may then be somewhat stricter. The distinction has a possible justification in common modes of thought and practice. A bill for services is felt to cast the burden on the debtor either to pay what is demanded, or, if dissatisfied, to state how much is due. A claim for damages is felt to be more appropriately a subject for assessment by the courts or by some form of arbitration. Even in such circumstances, one marks a growing tendency to make interest an incident where it might once have been excluded (*Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388; *Darlington v. Gates Land*

Co., 151 Wis. 461; *General Supply & Const. Co. v. Goelet*, 241 N. Y. 28, 39)."

Respectfully submitted,

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Dated: January 22, 1945.

APPENDIX A.

Fair Labor Standards Act of 1938 (29 U. S. Code, Sections 201, *et seq.*).

Sec. 3 (b) "'Commerce' means trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof" (Sec. 203 [b]).

Sec. 7 (a) "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" (Sec. 207 [a]).

Sec. 16 (b) "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" (Sec. 216 [b]).

APPENDIX B.

Rule 113 of Rules of Civil Practice of the State of New York.

RULE 113. SUMMARY JUDGMENT.

When an answer is served in an action.

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or liquidated demand arising on a judgment for a stated sum; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or

7. For specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; or

8. For an accounting arising on a written contract, sealed or not sealed.

The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such

evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in Subdivisions 3, 4 or 5 hereunder shall fail to show such facts as may be deemed, by the judge hearing the motion, to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the Court alone, or by the Court and jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in Subdivisions 6, 7 and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the Court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established prima facie by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The Court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions. (Am. March 14, 1932; June 15, 1933; cf. L. 1936, ch. 763, in effect Sept. 1.)